Filed 6/15/15 D.M. v. S.O. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

D.M., Plaintiff and Appellant, v. S.O., Defendant and Respondent.	E060621 (Super.Ct.No. FAMVS902291) OPINION

APPEAL from the Superior Court of San Bernardino County. Alexander R. Martinez, Judge. Dismissed.

D.M., in pro. per., for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

D.M. (father) and S.O. (mother) have two children together — son D.M., Jr., who is currently nine years old, and daughter A.M., who is currently eight years old.

From time to time, A.M. has claimed that she has been physically and/or sexually abused by the mother and/or by older half-siblings who live with the mother. According to the children's then-therapists, A.M.'s claims were credible. As a result, in 2011, the father was given sole physical custody of the children.

In 2012, however, an expert appointed by the trial court came to the dramatically different conclusion that the paternal grandmother, with the help of the father, was trying to alienate the children from the mother and that A.M. had been "coached." In response, in February 2013, the trial court ordered "psychotherapy for minor children for the purposes of reunification with [the mother]."

In December 2013, the trial court ordered that the children continue in therapy. However, it allowed the mother to have unsupervised visitation. It also ordered that the children have no contact with the paternal grandparents. Finally, it warned the father that, if his wife made disparaging remarks about the mother, it would impute them to him. It set a further hearing.

The father appeals. He contends the trial court erred by:

1. Allowing the mother to have unsupervised visitation.

2. Ordering that the children have no contact with the paternal grandparents.

3. Declaring that, if the paternal grandparents and/or the father's wife made unauthorized contact with the children or tried to turn the children against the mother, it would impute their actions to the father.

4. Refusing to join the paternal grandparents as parties and refusing to let them be heard on the issue of their joinder.

5. Ordering that the children receive therapy for the purpose of reunification with the mother.

6. Failing to be impartial.

We conclude that the father has appealed from a nonappealable order. We further conclude that some of his contentions relate to other orders from which he did not and could not appeal. Accordingly, we must dismiss the appeal.

I

APPEALABILITY OF THE DECEMBER 2013 ORDER APPEALED FROM

As mentioned, in December 2013, the trial court (1) allowed the mother to have unsupervised visitation, (2) ordered that the children have no contact with the paternal grandparents, and (3) warned the father that his wife should not make disparaging comments about the mother. The father appealed from this order, and he argues that each of these three aspects of the order was erroneous.

The threshold issue, then, is whether this order was appealable. "[S]ince the question of appealability goes to our jurisdiction, we are dutybound to consider it on our own motion. [Citations.]" (*Olson v. Cory* (1983) 35 Cal.3d 390, 398.)

"'Generally, no order or judgment in a civil action is appealable unless it is embraced within the list of appealable orders provided by statute.' [Citation.] With certain exceptions not pertinent here, appealable judgments and orders are listed in Code

of Civil Procedure section 904.1. [Citation.]" (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 19.)

In a family law case, as in all other cases, a final judgment is appealable. (Code Civ. Proc., § 904.1, subd. (a)(1); *In re Marriage of Nicholson & Sparks* (2002) 104 Cal.App.4th 289, 291, fn. 1.) "A judgment is 'final' for appeal purposes if it decides the parties' rights and duties and *effectively terminates* the litigation. '[W]here anything further in the nature of judicial action on the part of the court is essential to a final determination of the right of the parties, the decree is interlocutory' and thus not appealable. [Citations.]" (3 Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group 2014) ¶ 16:267, pp. 16-84-16-85.)

The December 2013 order did not terminate the litigation. The trial court ordered, "The children are to continue going through reunification therapy . . . ." It also stated, "We will have the parties come back for another review, follow-up of [the] reunification therapy . . . ." It set a further review hearing date.[1] It tried to prevent the father (and others associated with him) from making disparaging comments that could interfere with

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[1] At the next hearing, the trial court questioned whether the appeal was "valid." Nevertheless, it stated, "It's custody. . . . So while there is an appeal pending there can't be any new orders." Thus, it continued the hearing again.

Although the issue is not before us, strictly speaking, we point out that the filing of an appeal from a child custody or visitation order does *not* result in an automatic stay of the trial court proceedings. (Code Civ. Proc., § 917.7; *In re Natasha A.* (1996) 42 Cal.App.4th 28, 39 [Fourth Dist., Div. Two].) In addition, filing a purported notice of appeal from a nonappealable order does not result in an automatic stay. (*Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1409, fn. 4 and cases cited.)

reunification. In sum, it was trying to see if the children could be unified with the mother before it finally adjudicated visitation and custody. Thus, the order was a temporary custody order, which is not appealable. (*Smith v. Smith* (2012) 208 Cal.App.4th 1074, 1089-1090; *Banning v. Newdow* (2004) 119 Cal.App.4th 438, 456; *Lester v. Lennane* (2000) 84 Cal.App.4th 536, 557-565.)

The father states that the trial court had already "awarded" custody to the mother and visitation to him back in 2009, thus at least implying that the challenged order is appealable as an order after judgment. (Code Civ. Proc., § 904.1, subd. (a)(2).) The only information we have about the 2009 orders comes from the register of actions; it does not clearly indicate that they were intended to constitute a final judgment.[2] But even assuming they were, "not every postjudgment order that follows a final appealable judgment is appealable." (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 651.) In particular, a postjudgment order is not appealable if it is "preliminary to future proceedings" and will "become subject to appeal after a future judgment." (*Id.* at p. 654; see, e.g., *In re Marriage of Levine* (1994) 28 Cal.App.4th 585, 588-589.) Here, the order appealed from was preliminary to further proceedings. The trial court intended to determine whether the children could be reunified with the mother through therapy; if so,

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[2] It could also be argued that the October 2010 judgment of dissolution of marriage is the relevant final judgment. Again, however, the only information we have about that judgment comes from the register of actions. Because the parties were never married, the effect of this judgment is unclear.

it intended to adjust her visitation (and perhaps also her custody) accordingly. Only the order resulting from those proceedings would be appealable.

According to the father's statement of appealability (see Cal. Rules of Court, rule 8.204(a)(2)(B)), the order is appealable under Code of Civil Procedure section 904.1, subdivision (a)(6), which authorizes an appeal "[f]rom an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction." We disagree.

In a family law case, the orders that are most typically appealable as injunctions are domestic violence restraining orders. (*Loeffler v. Medina* (2009) 174 Cal.App.4th 1495, 1502, fn. 9.) By contrast, a temporary custody or visitation order is not generally viewed as an injunction. This is true even though it may include provisions allowing a parent to visit only at certain times or under certain circumstances.[3] If we were to deem the order here appealable as an injunction, virtually every temporary visitation order would likewise be appealable. As a policy matter, temporary visitation orders should be reviewed by writ, not by appeal, because reversal of an erroneous temporary visitation order after appeal may be an inadequate remedy. (Cf. *Lester v. Lennane*, *supra*, 84 Cal.App.4th at p. 565 [policy considerations favor review of temporary custody orders by writ].) Moreover, "'[t]he interests of clients, counsel, and the courts are best served by

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[3] For example, Judicial Council form FL-341, for use in making custody and visitation orders, allows the trial court to provide the dates and times for visitation and to make detailed provisions for transportation to and from visits. It also allows the court to require that visitation be supervised. Moreover, it allows the court to restrict a parent's travel with the child.

maintaining, to the extent possible, bright-line rules which distinguish between appealable and nonappealable orders.' [Citation.]" (*In re Marriage of Lafkas* (2007) 153 Cal.App.4th 1429, 1434.)

We also note that "pendente lite custody orders, which only establish temporary terms for custody and visitation, are *not* appealable under the collateral order doctrine." (1 Hogoboom & King, *supra*, ¶ 5:534.4, p. 5-213.) Here, custody (including visitation) is the only disputed issue in the case. Thus, the visitation order did not "finally resolve[] any matter 'severable from the general subject of the litigation.' [Citation.]" (*Lester v. Lennane, supra*, 84 Cal.App.4th at p. 562.)

Finally, for the sake of completeness, we note that under Code of Civil Procedure section 904.1, subdivision (a)(10), an appeal may be taken "[f]rom an order made appealable by the provisions of . . . the Family Code." Here, however, there is no provision of the Family Code that makes the challenged order appealable. (See, e.g., Fam. Code, § 2025 [in dissolution proceeding, trial court may certify immediate appeal of bifurcated issue].)

"An appellate court has discretion to treat a purported appeal from a nonappealable order as a petition for writ of mandate, but that power should be exercised only in unusual circumstances. [Citation.]" (*H.D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1366-1367.) In this case, if the father had filed a writ petition, the matter would have been resolved in a matter of weeks; by filing an appeal

instead, he enabled the status quo to go on for over a year. We see no point in treating the appeal as a writ at this late date.

II

APPEALABILITY OF THE APRIL 2013 ORDER

REFUSING TO JOIN THE PATERNAL GRANDPARENTS

The father also contends the trial court erred by refusing to join the paternal grandparents and by refusing to even let them be heard at the hearing on joinder.

As already discussed (see part I, *ante*), we do not have jurisdiction to hear any challenge to the December 2013 order. We do not have jurisdiction to hear this contention, either, but for a different reason: It relates to an earlier order.

The order denying joinder of the paternal grandparents was entered in April 2013. It was immediately appealable, because it left no issue to be determined regarding the paternal grandparents. (*Justus v. Atchison* (1977) 19 Cal.3d 564, 568, disapproved on another ground in *Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 171; *Stonewall Ins. Co. v. City of Palos Verdes Estates* (1996) 46 Cal.App.4th 1810, 1827.)

The father, however, did not appeal at that time. Indeed, he did not appeal at any time within 180 days of that order. (See Cal. Rules of Court, rule 8.104(a)(1)(C).) Finally, when he did at last appeal, his notice of appeal specified that he was appealing from an order entered in December 2013; it did not mention the April 2013 order. (See Cal. Rules of Court, rule 8.100(a)(2).)

"Failure to timely appeal an *immediately appealable* interim order . . . will *forever waive* the right to appeal the order. The matter adjudicated, even if erroneous, becomes final for all purposes and *res judicata*, and cannot be reviewed on a later appeal from the ultimate judgment or in connection with another appealable order. [Citations.]" (3 Hogoboom & King, *supra*, ¶ 16:271, pp. 16-87-16-88.) Hence, we cannot review the order denying joinder.

III

APPEALABILITY OF THE FEBRUARY AND AUGUST 2013 ORDERS THAT THE CHILDREN RECEIVE REUNIFICATION THERAPY

The father also contends the trial court lacked jurisdiction to order "reunification therapy."

In February 2013, the trial court ordered "psychotherapy for minor children for the purposes of reunification with [the mother]." In August 2013, it ordered that the children receive "reunification therapy" from a specified therapist.

Unlike the order denying joinder of the grandparents (see part II, *ante*), neither of these orders was appealable as either a final judgment or an order after judgment. Thus, they could be reviewed in an appeal from the first subsequent appealable order. (Code Civ. Proc., § 906.) For the reasons discussed in part I, *ante*, however, there has not been any subsequent appealable order. Thus, we cannot reach this issue.

IV

APPEALABILITY OF ISSUES OF JUDICIAL BIAS

The father contends that the trial judge was biased against him and against the paternal grandparents. In addition to the fact that this appeal is taken from a nonappealable order (see part I, *ante*), there are two separate and additional reasons why we cannot reach this contention.

First, the father forfeited this contention by failing to file a disqualification motion below. (Code Civ. Proc., § 170.3, subd. (c); *People v. Farley* (2009) 46 Cal.4th 1053, 1110.) "[A party] may not go to trial before a judge and gamble on a favorable result, and then assert for the first time on appeal that the judge was biased." (*People v. Rodriguez* (2014) 58 Cal.4th 587, 626.)

A fortiori, he also forfeited this contention by failing to file a prompt writ petition. "The determination of the question of the disqualification of a judge is not an appealable order and may be reviewed only by a writ of mandate from the appropriate court of appeal . . . ." (Code Civ. Proc., § 170.3, subd. (d); see also *People v. Brown* (1993) 6 Cal.4th 322, 335-336; *Roth v. Parker* (1997) 57 Cal.App.4th 542, 547-549.)

V

DISPOSITION

The appeal is dismissed. As the mother has not appeared, it is in the interests of justice that each side bear its own costs on appeal.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

KING
J.